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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 310

AMERICAN BARGE LINE COMPANY,
Petitioner,

vs.

OTTO J. MURPHY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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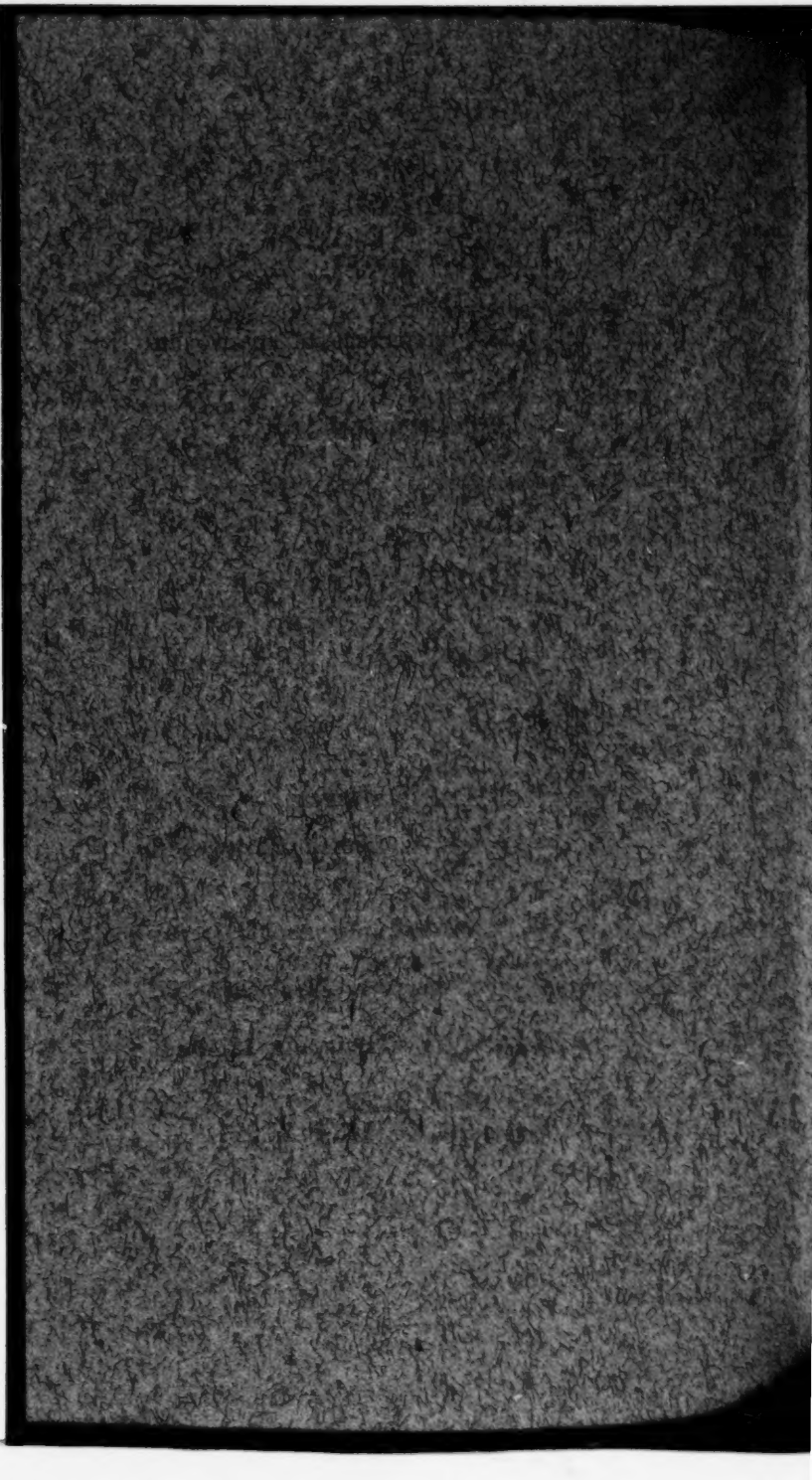

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice, and the Associate Justices of the United States:

Petitioner, American Barge Line Company, hereby petitions for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, rendered herein on August 2, 1948.

Summary and Short Statement of the Matter Involved

This matter involves a civil action in Admiralty, for maintenance and cure, arising out of an alleged injury sustained by the Respondent, on December 1, 1946, while performing his duties as a member of the crew of Petitioner's Motor Vessel "Duncan Bruce".

The injury for which recovery was sought in an action filed in the United States District Court for the Western District of Pennsylvania, occurred while the Respondent, a deckhand, was assisting the other crew members of the "Duncan Bruce" in making up a tow of barges at Baden, Pennsylvania. While so doing the Respondent slipped and fell on the icy surface of one of the Petitioner's barges. He performed his regular duties until he left the vessel at Pomeroy, Ohio, on December 4, 1946. He was discharged from Petitioner's employ, at that time, and was given a hospital ticket by the Master of the vessel.

The Respondent, after leaving the vessel returned to his home in Henderson, West Virginia, by bus and on December 5, 1946, went to the office of the Medical Officer, United States Public Health Service Relief Station located at Gallipolis, Ohio (approximately four miles from his home) to secure medical attention for an injury to his back sustained by reason of the above mentioned fall. The doctor not being at his office on the occasion of this visit, the Respondent returned on December 14, 1946, at which time his back was examined and strapped with adhesive tape. He returned and received treatment on December 23, 1946. On January 3, 1947, Respondent again returned and was told by the Medical Officer that all he could do for him had been done and that he (the Respondent) should go to the Marine Hospital at Pittsburgh, Pennsylvania. The Respondent, at that time, was given a note by the Medical Officer to secure his admission into that institution. On January 18, 1947, the Respondent again returned and stated that by reason of pain he could not stand the trip to Pittsburgh, a distance of approximately 200 miles from his home. He was again advised that he should go to Pittsburgh even though it might involve additional pain. The Respondent did not carry out the twice repeated sug-

gestion made by the Medical Officer and during the ensuing months he periodically performed hard physical work.

On December 24, 1947, the District Court filed its opinion, findings of fact and conclusions of law (R. pp. 93A-97A). On the issue involved in this petition that Court concluded, as a matter of law, that Respondent, by reason of his refusal to accept the proffer of hospitalization made to him by the Medical Officer, was not estopped to recover maintenance and cure (R. 95A). On December 31, 1947, the Court entered an Order awarding the Respondent the sum of $1,309.00 which represented maintenance and cure at a stipulated amount of $3.50 per day for 374 days. The award covered a period from the date the Respondent left the vessel (December 4, 1946), until the date of the trial (December 16, 1947) (R. p. 98A).

Petitioner appealed from said Order, and the Court of Appeals for the Third Circuit, in an opinion filed August 2, 1948, affirmed the District Court (R. pp. 99-103). In so doing that Court ruled that the Petitioner, in addition to providing a hospital certificate, was obligated to provide the means of getting to the Marine Hospital, and the record being silent as to whether that additional duty had been performed, the right to recover maintenance and cure existed.

Questions Presented

First. Whether, when an injured seaman has received a marine hospital ticket and is physically able to go by himself to a hospital, the vessel owner, in discharge of its duty to furnish maintenance and cure, is further obligated to take affirmative steps to provide the seaman with the means of getting to the hospital.

Second. Whether the Circuit Court of Appeals, in an admiralty appeal, may predicate its affirmance of the lower

court's decision by ruling upon an issue which was not decided by the lower court nor urged by either party, on appeal.

Reasons Relied On for the Allowance of the Writ

The following reasons for the allowance of the writ are relied on by the Petitioner:

First. The Circuit Court of Appeals has decided an important question of law involving the duties of all vessel owners under the admiralty doctrine of maintenance and cure. The decision is contrary to and is in conflict with prior Federal court decisions which hold that the offer of hospital services is a fulfilment of the vessel owner's obligation to furnish maintenance and cure to an injured seaman.

Second. The Circuit Court of Appeals, in the exercise of its appellate powers, was without authority to base its affirmance upon an issue which was not before the District Court nor raised by either party on appeal. The decision raises an important question regarding the scope of review in an admiralty appeal.

Wherefore, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Third Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9599, *Otto J. Murphy, Libelant-Appellee* v. *American Barge Line Company, Respondent-Appellant,* and that said judgment of the United States Court of Appeals for the Third Circuit may be reversed by this Honorable Court, and that your

Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray.

AMERICAN BARGE LINE COMPANY,
By FREDERICK L. LECKIE,
Proctor for American Barge Line Company, Petitioner.

LECKIE MCCREARY SCHLITZ & HINSLEA,
LUCIAN Y. RAY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

AMERICAN BARGE LINE COMPANY,
Petitioner,

vs.

OTTO J. MURPHY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

The opinion in the United States Court of Appeals for the Third Circuit is unreported. The opinion was filed August 2, 1948 (R. p. 99). The opinion in the United States District Court for the Western District of Pennsylvania is reported in *Murphy* v. *American Barge Line Company*, 74 F. Supp. 886 (R. p. 96a).

II

Jurisdiction

The judgment of the Circuit Court of Appeals was entered August 2, 1948. The jurisdiction of this Court is invoked under Judicial Code, Section 240(a) as amended by the Act of February 13, 1925, 43 Stat. 938.

III

Statutes Involved

No statutes are involved in the decisions of either of the Courts below.

IV

Statement of the Case

The undisputed facts, pertinent to this petition, have been set forth in the petition under the section entitled Summary Statement of the Matter Involved and will be omitted here.

V

Specification of Errors

1. The Circuit Court of Appeals erred in holding that a vessel owner, in discharge of its duty to furnish maintenance and cure, is required to provide an injured seaman with the means of getting to a marine hospital.

2. The Circuit Court of Appeals erred in affirming the decision of the District Court on an issue which had not been decided by that Court nor urged by either party, on appeal.

VI

ARGUMENT

Summary of the Argument

Point A.—The doctrine of maintenance and cure is an extremely important principle of maritime law. The decision of the Court of Appeals for the Third Circuit constitutes an unwarranted expansion of that doctrine and is the first decision of a Federal court to require a vessel owner

to furnish an injured seaman with the means of getting to a marine hospital.

Point B.—The decision of the District Court was predicated on the ground that the injured seaman had not declined the proffered medical treatment by refusing, because of anticipated pain, to travel to the marine hospital. The affirmance by the Circuit Court of Appeals was not based upon that ground but upon the ground that the vessel owner had not discharged its obligation to provide the means to get the injured seaman to the hospital. The Circuit Court of Appeals was without authority to decide an issue which was not before the District Court nor raised by either party, on appeal.

Point A

The Circuit Court of Appeals, after disposing of the fact question raised by the appeal, said, with reference to the question of law, "The legal point is exceedingly interesting and some phases of it are novel" (R. p. 100). The same thing may be said with reference to that Court's decision of that legal point. Judicial pronouncements in innumerable decisions have pointed to the affirmative duties of vessel owners, under the maintenance and cure doctrine, to seamen injured in their employ and the scope of their obligation has been clearly defined. The decision of the Circuit Court of Appeals in this case, is, as far as we have been able to determine, the first ruling of any court which extends those duties and that scope to require a vessel owner to seek out an injured seaman who has left its employ and provide the means of getting the seaman to a marine hospital. This Court may, we respectfully urge, take judicial notice of the fact that there are literally thousands of instances where seamen are injured and the nature of the injury is such that the seamen are physically able to avail them-

selves of the marine hospitals to which they have recourse as pointed out by this Court in *Calmar S.S. Corp.* v. *Taylor,* 303 U. S. 525, 531. Where the type of injury is such that removal from the vessel to the hospital in an ambulance is required, that detail is attended to by the master of the vessel, but where the injury is non-disabling, the vessel owners, in conformance with the prior Federal decisions on the subject, have been discharging their obligation to furnish maintenance and cure by proffering hospitalization and paying such maintenance as is required for the period following the hospitalization. If the decision below is sound and the vessel owners do have the additional duties set forth in that decision, then the entire method of caring for injured seamen and disposing of their claims will have to be revised for no vessel owner can, under the doctrine of that decision, safely and completely discharge its obligation to furnish maintenance and cure, without keeping the seaman who has left the vessel under constant surveillance to see that he gets to the hospital and that the means of getting there are provided. The decision has far reaching implications not only for the vessel owners but also for the injured seamen, and a decision by this Court defining the scope of the vessel owners' duties would be beneficial to the entire maritime industry.

The Court of Appeals for the Third Circuit cites the decisions of three other Circuit Courts of Appeals which hold that the offer of hospital services constitutes a fulfilment of the vessel owner's obligation to furnish maintenance and cure to an injured seaman (R. p. 100). Although the Court below states that the above mentioned doctrine is applicable to the instant case, it declined to apply it and ruled that the offer of hospitalization is not sufficient unless the offer is supplemented by supplying the means of getting to the hospital. In *United States* v. *Loyola,* 161 F. (2d) 126

(C. C. A. 9, 1947) and *June* v. *Pan-American Petroleum & Transport Co.*, 25 F. (2d) 457, 458 (C. C. A. 5, 1948), the injured seamen's claims for maintenance and cure were rejected upon a showing that hospital certificates had been issued and that the seamen had declined to go to a marine hospital. It is undisputed, in the case at bar, that a hospital certificate was issued and that Murphy declined to follow the recommendation of the United States Public Health Service doctor that he go to the Marine Hospital at Pittsburgh for treatment. Under the above cited rulings in the Ninth and Fifth Circuits the Respondent's right to recover maintenance and cure subsequent to his refusal to accept the proffered hospitalization would have been denied. The ruling of the Court below which imposes, as a condition precedent to the fulfilment of the vessel owner's obligation, the requirement that the means of getting to the hospital be supplied, is contrary to and in conflict with the above mentioned decisions.

Point B

In the District Court issue was joined on the question as to whether the refusal of the injured seaman to go to the Marine Hospital at Pittsburgh operated to deprive him of the right to recover maintenance and cure (R. pp. 1A-3A). Murphy testified that he had not gone to the hospital because the trip would involve too much pain. The District Court ruled that the excuse was justified, as a matter of law, and that there had been no rejection of the proffered hospitalization (R. p. 95A). No issue was raised as to the obligation of the Petitioner to supply the means of getting to the Marine Hospital and no testimony was adduced by either party bearing upon that point. The Circuit Court of Appeals ruled that the fact that a journey to get medical treatment might involve acute physical discomfort is not a legal excuse for declining to accept the proffered

treatment (R. p. 101). It also ruled that if that were all that was involved in the case, it would be inclined to cut off the right to recover maintenance and cure at the time Murphy refused to go to the Marine Hospital at Pittsburgh (R. p. 102). The Circuit Court of Apepals then, after adverting to the fact that there was no testimony as to the means by which Murphy was to get to the hospital, or who would reimburse him for the travel expense, ruled that the obligation to furnish maintenance and cure had not been discharged. The Opinion of the Circuit Court of Appeals makes it plain that but two issues were before it, on appeal. One was the issue of fact as to whether the seaman had sustained a disabling injury while in the vessel owner's employ, and the other, the question of law, as to whether the seaman's refusal to accept hospitalization was justified (R. p. 99). The ground upon which the District Court's decision was affirmed was not at issue before the District Court and was not at issue, on appeal. Because of the absence of proof on an issue that was never, at any time, a part of this litigation, the Circuit Court of Appeals has created a previously non-existing duty and then ruled that that duty was not discharged. This Court and inferior Federal courts have ruled that an appeal in admiralty to the Circuit Court of Appeals is a trial *de novo*. *Brooklyn Eastern Terminal* v. *United States,* 278 U. S. 170, 176; *Munson Steamship Line* v. *Miramar Steamship Co.,* 167 Fed. 960. The fact that an appeal in admiralty operates to vacate the judgment of the district court and vests the appellate court with authority to make its own independent determination of issues of fact and of law does not, we respectfully urge, vest it with the power to determine an issue which was not presented in any form to the trial court. This restriction of the scope of review of the appellate court is judicially recognized. In *Paauhau Sugar Plantation Co.* v. *Palapala,* 127 Fed. 920 (C. C. A. 9)

the issue as to the libelant's age in connection with his right to bring an action for personal injury, in admiralty, was not presented to the trial court for determination. The Court of Appeals for the Ninth Circuit ruled that the issue could not be considered in that Court and said (p. 922):

> "In the present case it was not presented in any form or manner whatsoever in the court below, and cannot be considered by this court. Wasatch M. Co. *v.* Crescent M. Co., 148 U. S. 293, 298, 13 Sup. Ct. 600, 37 L. Ed. 454."

A similar ruling was made by the same Court in the recent case of *Vileski* v. *Pacific-Atlantic S. S. Co.*, 163 F. (2d) 553 (C. C. A. 9, 1947) in which an attempt by the libelant to raise an entirely new issue on appeal was rejected. In that connection the Court said (pp. 555, 556):

> "Libelant on this appeal seeks to raise a new issue, namely, that the cure of his injury is not sufficient and that he is entitled to the cost of services of a physician in addition to the cure undertaken by the United States Marine Hospital at San Francisco. No such issue is tendered in the libel. Libelant's counsel in his opening statement confined the issue to liability for maintenance and to the claimed negligence. No finding as to cure was made by the district court. No amendment to the libel is here sought. • • • The libelant is not entitled so to mend his hold even in an admiralty appeal."

The considerations which preclude a party from securing a ruling on issues raised for the first time in the appellate court, also precludes the Court from deciding an issue which the court, itself, raises. The action of the Court below, in the case at bar, is not only unauthorized but is manifestly unjust. The Petitioner, as a result of the Court's ruling, stands convicted of a failure to discharge a duty without being afforded the opportunity of submitting any proof, in any court, in defense of the alleged breach. The

ruling, we respectfully urge, presents an important question relative to the authority of the Circuit Courts of Appeal and the scope of their review in admiralty appeals.

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that a determination of the two above mentioned questions of maritime law may be had and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the Third Circuit and finally reverse it.

Respectfully submitted,

FREDERICK L. LECKIE,
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